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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-1591

THE PEOPLE OF THE STATE OF MICHIGAN,

Petitioner,

vs.

RECORDER'S COURT JUDGE:
In the Matter of People v Janice Lee Alexander,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MICHIGAN

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. .....

THE PEOPLE OF THE STATE OF MICHIGAN,

Petitioner,

vs.

RECORDER'S COURT JUDGE:
In the Matter of People v Janice Lee Alexander,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MICHIGAN

Now Comes William L. Cahalan, Prosecuting Attorney in and for the County of Wayne, State of Michigan, by Edward R. Wilson, Chief Appellate Attorney, and Timothy A. Baughman, Assistant Prosecuting Attorney, and prays that a Writ of Certiorari issue to review the judgment of the Court of Appeals of the State of Michigan, entered in the above-entitled cause on November 9, 1977, leave to appeal denied by the Michigan Supreme Court on February 8, 1978.

OPINIONS BELOW

The opinion of the Wayne County Circuit Court is unreported, and is appended as Appendix "A". The opinion of the Michigan Court of Appeals is reported at ___Mich App ___(1977); ___NW2d___(1977), and is appended as Appendix "B". The order of the Michigan Supreme Court denying Petitioner's application for leave to appeal is appended as Appendix "C".

STATEMENT OF JURISDICTION

The judgment of the Michigan Court of Appeals was entered on November 9, 1977. The Michigan Supreme Court denied Petitioner's application for leave to appeal on February 8, 1978. The jurisdiction of this Court is invoked under 28 USC, Sec. 1257(3).

QUESTIONS PRESENTED

I.

Do Harris v New York, 401 US 222; 91 S Ct 644; 28 L Ed 2d 1 (1971) and Michigan v Tucker, 417 US 433; 94 S Ct 2357; 41 L Ed 2d 182 (1974) compel the conclusion that Miranda v Arizona, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966) cannot apply to the States?

II.

Can Miranda v Arizona, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966) be justified by the language of the Fifth Amendment?

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> No person. . .shall be compelled in any criminal case to be a witness against himself. . . .

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> . . .No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF FACTS

Janice Lee Alexander was charged with second-degree murder in the shooting death of her husband (R 2). After her arrest, and before the institution of formal judicial proceedings, defendant was advised of her rights under Miranda v Arizona, 384 US 436; 86 S Ct 1602, 16 L Ed 2d 694 (1966), and signed a form acknowledging that she had been so advised (R 5). Upon being advised of her Miranda rights, defendant asked the officer "if I thought she should have an attorney and I told her I thought she should tell me what happened." (R 8) The officer felt defendant was asking for his advice (R 9). Defendant made a statement, which the officer wrote down. Defendant read it and signed it (R 10-11).

The examining magistrate held that the statement was taken in violation of Miranda and was inadmissible. Without the confession, the People were unable to connect defendant to the murder, and the case was dismissed.

Recorder's Court judges sit as both circuit level judges and as magistrates for criminal cases in the City of Detroit. When they sit as magistrates in preliminary examination, review of their rulings is by a Complaint for Superintending Control in the Wayne County Circuit Court. The judge is the named defendant, as the action is considered as original civil action, but counsel for the defendant is served and may respond. The Wayne Circuit Judge agreed that the statement had been taken in violation of Miranda, and denied relief. The Michigan Court of Appeals also agreed, and the Michigan Supreme Court denied leave to appeal.

REASONS FOR GRANTING THE WRIT

I.

THE LOGICAL CONSEQUENCE OF THE DECISIONS OF HARRIS V NEW YORK AND MICHIGAN V TUCKER IS THAT MIRANDA V ARIZONA NO LONGER APPLIES TO THE STATES.

The Miranda Court itself recognized that the procedures it was requiring "were not themselves rights protected by the Constitution but were instead measures to insure that the right against compulsory self-incrimination was protected." Tucker, 417 US at 444; 41 L Ed 2d at 193; Miranda, 384 US at 467. Although Miranda suggested that no custodial statement taken absent warnings can be voluntary, a notion so devoid of empirical support as to be "without rational foundation" (see Justice White's dissent in Miranda), and contrary to the common experience of mankind, Tucker clearly recognized that the prophylactic rules are separable from the Fifth Amendment, and that a statement may be voluntarily given though one of the prophylactic rules is violated:

> We will therefore first consider whether the police conduct complained of directly infringed upon respondent's right against compulsory self-incrimination or whether it instead violated only the prophylactic rules developed to protect that right." (emphasis added). Tucker, 417 US at 439; 41 L Ed 2d at 190.

The Court then concluded that:

> the police conduct at issue here did not abridge respondent's constitutional privilegie against compulsory self-incrimination, but departed only from the prophylactic standards later laid down by this Court in Miranda to safeguard that privilege." Tucker, 417 US at 446; 41 L Ed 2d at 194.

Thus, Tucker stands as a specific example of a case where the United States Supreme Court determined that a Miranda violation occurred, yet the statement given was found not to be "compelled" so as to violate the Fifth Amendment. So also with Harris v New York, where the Court concluded that Miranda defective statements, if voluntary, may be used for impeachment purposes.

In the instant case no tenable claim can be made that the confession given by defendant was compelled nor does Massiah v United States, 377 US 201; 84 S Ct 1199; 12 L Ed 2d 246 (1964) apply, as judicial proceedings had not begun. Cf. Brewer v Williams, ___ US ___; 51 L Ed 2d 424 (1977). If, as Tucker and Harris state, confessions may be given which are voluntary though one of the prophylactic rules of Miranda has been violated, from what source comes the power of the United States Supreme Court to compel a state court to exclude from evidence a confession which was taken in violation of no constitutionally guaranteed right? Surely not from Article III of the United States Constitution:

> Section 2: The Judicial Power shall extend to all cases, in Law and Equity, arising under this Constitution, the Laws of the United States ....

from which the federal courts derive their jurisdiction.

Once the principle was established in Harris and Tucker that a statement taken after the giving of defective Miranda warnings is not per se coerced (a principle which would seem self-evident), then logic dictates that federal courts have no power to hold that voluntary statements are "inadmissible" for any purpose in state courts. The question is, and always should have been, was the statement compelled or not, with Miranda warnings being but one consideration in an examination of the totality of the circumstances. Thus, the Recorder's Court judge should not examine whether or not Miranda was violated, but whether or not the statement was voluntarily given. Petitioner submits that the record in this case clearly demonstrates that the statement involved here was voluntarily given, but that decision should be made on remand, as it has never been considered by any court.

II.

THE LANGAUGE OF THE FIFTH AMENDMENT FAILS TO SUPPORT THE PRINCIPLES OF MIRANDA.

In Miranda, the United States Supreme Court held that:

> ...the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination...Prior to any question, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed.

A defendant may waive these "rights", but any waiver must be "voluntary, knowing, and intelligent". However, "the Court recognized that these procedural safeguards were not themselves rights protected by the Constitution." (emphasis added). Michigan v Tucker, 417 US 433; 41 L Ed 2d 182; 94 S Ct 2357 (1974). Thus, it logically follows (and has no doubt occurred), that a confession may be excluded from evidence when it was not compelled, but rather was voluntarily given (e.g. the instant case), though a violation of one of the prophylactic rules occurred. Petitioner fails to see how the language that no person "shall be compelled in any criminal case to be a witness against himself" can support such a result. Where it is clear that the confession was not compelled, how can its admission violate an accused's right not to be compelled to speak? Petitioner submits that the language of the Fifth Amendment fails to support Miranda.

The Miranda rules, Petitioner contends, are the result of a beguiling linguistic flaw in that opinion's interpretation of the language of the Fifth Amendment that no person "shall be compelled in any criminal case to be a witness against himself." The error lies in the translation of the right against compulsory self-incrimination into a right to remain silent, or a right against self-incrimination, from which logically flows the notion that when one voluntarily consents to make a statement he is thereby waiving a right, the right to remain silent, or against self-incrimination, thus bringing into play the doctrine that waivers of constitutionai rights must be "knowing, voluntary, and intelligent." Johnson v Zerbst, 304 US 458; 82 L Ed 1461; 58 S Ct 1019 (1938). But this constitutes a fundamental misreading of the langauge of the Fifth Amendment. There is Amendmentno constitutionally guaranteed right "to remain silent" which is waived by a volunatry consent to speak; there is, rather a constitutionally guaranteed right not to be compelled to speak, which can never be waived. When one voluntarily consents to speak he is perforce not consenting to be compelled to speak, which is the right which the Fifth Amendment guarantees, he is simply consenting to speak. If the consent is not voluntary then he has been compelled, and the language of the Fifth Amendment applies directly. If, then, when one speaks he is not waiving a right, and again, Petitioner is at a loss to explain how one can possibly waive his right not to be compelled to speak (he is either compelled, or he is not), then the entire waiver analysis of Miranda must be seen as unsupported by the language of the Fifth Amendment. What is left, then is the only test which squarely comports with the langauge of the Fifth Amendment: under the totality of the circumstances, was the statement voluntarily given, or was it compelled?

Support for a voluntariness approach to confessions may be found by analogy in the analysis of the Fourth Amendment in Schneckloth v Bustamonte, 412 US 218; 36 L Ed 2d 854; 93 S Ct 2041 (1973), concurred in by the Michigan Supreme Court in People v Lumpkin, 394 Mich 456 (1975). The Fourth Amendment guarantees the right of the People to be secure "against unreasonable searches and seizures." When one consents to a search, he does not and cannot waive his right not be to be subject to an unreasonable search, for consent makes the search reasonable. In the Fourth Amendment area the Supreme Court did not fall into the error of applying a waiver analysis to the consent to search. Thus, it is that Schneckloth rejects any requirement that one be apprised that he need not consent to a search for the consent to be valid, holding instead that the question of consent is one of voluntariness, and turning, interestingly enough, to confession cases for the test of voluntariness. 412 US at 223; 36 L Ed 2d at 860. The test is one of a totality of the circumstances.

> the question whether a consent to a search was in fact "voluntary" or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances. While knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish such knowledge as the sine qua non of an effective consent. As with police questioning, two competing concerns must be accommodated in determining the meaning of a "voluntary" consent -- the legitimate need for such searches and the equally important requirement of assuring the absence of coercion.
>
> 412 US at 227; 36 L Ed 2d at 862-863.

Stripped of the faulty waiver analysis supplied by Miranda, the Fifth Amendment is revealed to require no more than stated above in Schneckloth -- that it be demonstrated by looking at the totality of the circumstances (a part of which could very well be the presence or absence of Miranda warnings, with such not being the sine qua non for consent), that consent to speak was not compelled but was voluntarily given. In the instant case, there can be no question but that defendant was not compelled to speak.

CONCLUSION

It is respectfully submitted that for the reasons outlined above, substantial federal questions are presented such that plenary review should be granted.

Respectfully submitted,

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Dated: May 4, 1978.

APPENDIX "A"

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

-v- Circuit Court

No. 76-639-713-AS

THE HONORABLE SUSAN D. BORMAN,
Judge of the Recorder's Court
for the City of Detroit,

Defendant.
_____/

Complaint for an Order of Superintending Control: In the Matter of People of the State of Michigan v. Janice Lee Alexander, Recorder's Court No. 76-01672
_____/

OPINION AND ORDER

DENYING REQUEST FOR

ORDER OF SUPERINTENDING CONTROL

Janice Lee Alexander was charged with Murder Second Degree and appeared for preliminary examination before Recorder's Court Judge Susan D. Borman. The prosecutor attempted to introduce into evidence a statement made by Defendant at a post-arrest custodial interrogation. Defense objected on the basis that the statement was taken in violation of procedures required by Miranda v Arizona, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

The interrogating officer testified at the preliminary exam that he had informed Defendant of her constitutional rights, as required by Miranda, by reading them to her from a card, which she signed. He then testified, "She asked me if I thought she should have a lawyer and I told her I thought she should tell me what happened." (T. 8). Defendant then made the allegedly incriminating statement. On September 21, 1976, after receiving briefs on the issue of admissibility of the statement on these facts, the Judge refused to admit the statement and dismissed the charge for failure to establish probable cause, there being no other evidence connecting Defendant with the crime. The People have filed a Complaint for Superintending Control asking that the dismissal of the charge be vacated and the cause remanded with directions to receive the statement into evidence.

The Prosecutor's argument rests on the assumption that Defendant's question to the interrogating officer was merely a request for advice and not a request for counsel. The Judge's refusal to admit the statement must, therefore, have been based on a determination that Defendant's question was an indication of a desire for counsel (See Memorandum of Law to the Court adopted by the Judge at the September 21 hearing, p 3). Further interrogation was therefore clearly in violation of Miranda.

The Miranda Court said, at 706, "If . . . he indicates in any manner and at any stage of the proceedings that he wishes to consult with an attorney before speaking, there can be no questioning." (Emphasis added.) Recent United States Supreme Court cases limiting Miranda (Michigan v Mosely, 423 US 96; 96 S Ct 321; 46 L Ed 2d 313 [1975] and Oregon v Hass, 420 US 714; 95 S Ct 1215; 43 L Ed 2d 570 [1957]) have not weakened this imperative language, but have dealt with

other issues not pertinent to this case. In addition, in People v Lewis, 47 Mich App 450 (1973) the Court overturned a conviction based on a statement taken after the Defendant had asked whether it was possible to obtain an attorney at such an early hour and then said, "Forget it," when he was told it was not possible. Thus an ambiguous indication of an interest in having counsel has been held to require cessation of questioning, with the resulting statement being inadmissible.

The scope of review of a superintending court has been clearly defined - the magistrate is to be upheld unless an examination of the record shows there was such an abuse of discretion as to amount to failure to perform a clear legal duty. The superintending court does not substitute its discretion or judgment for that of the magistrate. People v Flint Municipal Judge, 383 Mich 429 (1970), People v Dellabonda, 265 Mich 486 (1933), People v Karcher, 322 Mich 158 (1948), Peoplev Davis, 343 Mich 348 (1955), People v Paille #2, 383 Mich 621 (1970). This Court finds no such abuse of discretion in the magistrate's refusal to admit the statement based on her determination that Miranda restrictions applied in this fact situation.

/a/ JAMES N. CANHAM
Chief Judge

Dated: February 9, 1977

Detroit, Michigan

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

-v- Circuit Court

No. 76-639-713-AS

THE HONORABLE SUSAN D. BORMAN,
Judge of the Recorder's Court
for the City of Detroit,

Defendant.
_____/

Complaint for an Order of Superintending Control: In the Matter of People of the State of Michigan v. Janice Lee Alexander, Recorder's Court No. 76-01672
_____/

ORDER

At a session of said Court held in the City-County Building, Detroit, Michigan, on February 9, 1977

PRESENT: HON. JAMES N. CANHAM
Chief Judge

IT IS HEREBY ORDERED AND ADJUDGED that Complainant's request for an Order of Superintending Control is DENIED.

/s/ JAMES N. CANHAM
Chief Judge

Dated:

Detroit, Michigan

APPENDIX "B"

STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of: People v Janice Lee Alexander

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v No. 77-636

RECORDER'S COURT JUDGE,

Defendant-Appellee.

BEFORE: Holbrook, P.J., and N. J. Kaufman and McDonald, JJ. N. J. KAUFMAN, J.

Plaintiff appeals an order by Wayne County Circuit Judge James N. Canham denying plaintiff's motion for a writ of superintending control directing defendant to reinstate a charge of second-degree murder against Janice Lee Alexander and bind her over for trial.

Ms. Alexander was charged with second-degree murder, MCLA 705.317; MSA 28.549, in connection with the slaying of William Robinson. On June 3, 1976, an examination began before defendant Judge Borman. Plaintiff attempted to introduce a statement given by Ms. Alexander to a police officer. The officer testified that Ms. Alexander had been given her Miranda[1] rights and that she then asked him "if I thought she should have an attorney and I told her I thought she should tell me what happened."[2] Upon submission of briefs, defendant ruled the confession inadmissible and dismissed the case.

Plaintiff then sought a writ of superintending control in Wayne County Circuit Court. Judge Canham noted that "[t]he Prosecutor's argument rests on the assumption that Defendant's question to the interrogating officer was merely a request for advice and not a request for counsel." Judge Canham concluded "The Judge's refusal to admit the statement, must, therefore, have been based on a determination that Defendant's question was an indication of a desire for counsel * * *. Further interrogation was therefore clearly in violation of Miranda.

His conclusion was bolstered by specific language from Miranda holding that an indication in any manner that counsel is requested halts further questioning until counsel is produced. Further, Judge Canham persuasively distinguished other United States Supreme Court cases limiting the holding of Miranda in other areas. Judge Canham also cited People v Lewis, 47 Mich App 450; 209 NW2d 450 (1973), wherein this Court held that an ambiguous indication of an interest in having counsel required cessation of interrogation.

Noting the limited scope of review inherent in a superintending court, Judge Canham found no abuse of discretion.

This court's review of the circuit court's denial is also subject to an "abuse of discretion" standard, People v Flint Municipal Judge, 41 Mich App 766, 770-771; 201 NW2d 111 (1972). See also People v Dellabonda, 265 Mich 486; 251 NW 594 (1933). Thus, the ruling of the reviewing court in this case can be overturned only if this Court finds that the reviewing court abused its discretion in finding that the examining magistrate did not abuse her discretion.

We find no abuse of discretion. Therefore, we affirm the circuit court. We note, in passing, that were we to examined the record de novo, we would find no error for the reasons so ably expressed by Judge Canham.

Affirmed.

1

Miranda v Arizona, 384 US 486; 86 S Ct 1602; 16 L Ed 694 (1966).

2

We note that, although we do not examine the record de novo, it is clear to us that the officer expected Ms. Alexander to relate "what happened" in the absence of an attorney. This conclusion is especially valid when it is recognized that Ms. Alexander had not been schooled in either the subleties of police interrogation or the law surrounding Miranda-type situations.

APPENDIX "C"

At a Session of the Supreme Court of the State of Michigan, Held at the Supreme Court Room, in the City of Lansing, on the 8th day of February in the year of our Lord one thousand nine hundred and seventy-eight.

Present: The Honorable Thomas Giles Kavanagh, Chief Justice, G. Mennen Williams, Charles L. Levin, Mary S. Coleman, John W. Fitzgerald, James L. Ryan, Blair Moody, Jr., Associate Justices.

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because the Court is not persuaded that the questions presented should be reviewed by this Court.

State of Michigan -- ss.

I, Harold Hoag, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

In Testimony Whereof, I have hereunto set my hand affixed the seal of said Supreme Court at Lansing, this 8th day of February in the year of our Lord one thousand nine hundred and seventy-eight.

Supreme Court, U. S.
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No. 77-1591

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

THE PEOPLE OF THE STATE OF MICHIGAN,
Petitioner,

v.

RECORDER'S COURT JUDGE,
(In the matter of *The People* v *Janice Lee Alexander*),
Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of the State of Michigan

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COUNTER-STATEMENT OF QUESTIONS INVOLVED

I.

ARE THE RULES OF LAW GOVERNING THE ADMISSIBILITY OF CONFESSIONS, AS DECIDED IN *MIRANDA* v *ARIZONA*, CURRENTLY APPLICABLE TO STATE PROSECUTIONS?

II.

SHOULD THE CONFESSION OF A DETAINED SUSPECT BE ADMITTED IN EVIDENCE WHERE THE SUSPECT, UPON BEING ADVISED OF THE RIGHT TO COUNSEL, ASKED THE INTERROGATING OFFICER, "DO YOU THINK I NEED AN ATTORNEY?", AND IS TOLD IN REPLY, "I THINK YOU SHOULD TELL ME WHAT HAPPENED", AND THE CONFESSION FOLLOWS?

COUNTER-STATEMENT OF FACTS

The criminal defendant in the case out of which the above-referenced appellate proceedings arose was arrested and charged with murder in the second degree under Michigan Statute, MCLA 750.317. She was advised of her rights under *Miranda* v *Arizona,* 384 US 436; 16 L Ed 2d 694 (1966), including, specifically, her right to counsel. Thereafter, she asked the officer who had advised her, whether he thought she should have a lawyer, whereupon the officer replied, "I think you should tell me what happened." The defendant's inculpatory statement followed and the same was offered in evidence upon preliminary examination in the Recorder's Court of Detroit. The magistrate excluded the statement which was the sole evidence offered in support of probable cause. In consequence of such exclusion requisite probable cause was not shown for holding the defendant for trial and the case was dismissed.

The petitioner, by the prosecuting attorney for Wayne County, sought an Order of Superintending Control in the form of writ of mandamus in the Wayne County Circuit Court to direct the magistrate to reinstate the said case and bind the defendant over for trial. Briefs were filed on behalf of the petitioner (the people) and on behalf of respondent, Judge of the Recorder's Court. Upon hearing arguments of counsel, the Circuit Court denied the petition.

The petitioner appealed the Circuit Court's order to the (intermediate) Michigan Court of Appeals, which affirmed the Wayne County Circuit Court in its denial of an order reinstating the criminal case. The petitioner then sought leave to appeal to the Michigan Supreme Court. Leave was denied by that Court and the petitioner now seeks a writ of certiorari from this Court to the Michigan Court of Appeals.

REASONS FOR DENYING WRIT

I.

THE RULES OF LAW DECLARED IN *MIRANDA* v *ARIZONA*, AS GOVERNING THE ADMISSIBILITY OF CONFESSIONS REMAIN APPLICABLE TO STATE PROSECUTIONS.

Put in its most simple terms, the thrust of the petitioner's argument seems to be that this Court has declared, by dicta or inference in at least two cases, that the legal principles governing the admissibility of confessions as laid down in *Miranda* v *Arizona,* 384 US 436; 16 L Ed 2d 694, 86 S Ct 1602 (1966), are no longer applicable to State prosecutions. Petitioner cites as purported authority for that proposition, the cases of *Michigan* v *Tucker,* 417 US 433, 41 L Ed 2d 182, 94 S Ct 2357 (1974), and *Harris* v *New York,* 401 US 222, 28 L Ed 2d 1, 91 S Ct 644 (1971).

To take petitioner's contention seriously is to reject the long line of decisions handed down by this Court beginning with *Mapp* v *Ohio,* 367 US 643, 1 L Ed 2d 1081, 81 S Ct 1684 (1961), which made the exclusionary rule of *Weeks* v *United States,* 232 US 383, 58 L Ed 652, 34 S Ct 341 (1914), applicable to the States through the due process clause of the Fourteenth Amendment to the Federal Constitution. Indeed, it is folly to argue that a decision of the United States Supreme Court, having the scope and profundity of *Miranda* as well as its preciseness and clarity, would be nullified by strained and tortured inferences.

Actually, one could examine and reexamine in vain the opinions in both *Tucker* and *Harris* in a search for language from which a conclusion could fairly and reasonably be drawn to the effect that the principles of *Miranda* no

longer apply to State prosecutions. Petitioner quotes no such language and makes no apt reference thereto. Respondent respectfully urges that petitioner misinterprets the express language of these opinions and misreads their import, as well. The opinion of the majority in *Tucker* was substantially limited to the conclusion that *Miranda* was inapplicable to a "post-*Miranda*" trial in which the admissibility of a "pre-*Miranda*" statement was at issue, and that on the basis of the pertinent facts in the case the defendant's constitutional rights had not been violated.

Petitioner emphasizes the use of the term "prophylactic standards" as used in *Miranda* in relations to suspects' confessions given while in custody, that phrase is merely descriptive of the standards prescribed, which themselves, are necessarily complimentary to the long-standing voluntariness requirement, rather than alternative to it. It is fair to say that these standards constitute an indispensable hallmark of the voluntariness requirement without which voluntariness can hardly be judicially recognized. No one seriously disputes any longer that voluntariness is the threshold over which confessions pass into evidence. In *Jackson* v *Denno,* 378 US 368, 84 S Ct 1774, 12 L Ed 2d 908 (1964), this Court said at page 376 (US):

> "It is now axiomatic that a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession without regard for the truth or falsity of the confession, *Rogers* v *Richmond,* 365 US 534, 81 S Ct 735, 5 Led2d 760. . . . *Malinski* v *New York,* 324 US 401, 65 S Ct 781, 89 Led2d 1029; *Stroble* v *California,* 343 US 181, 72 S Ct 599, 96 Led 872; *Payne* v *Arkansas,* 356 US 560, 78 S Ct 844, 2 Led2d 975. . . ."

The principle recited in *Jackson* v *Denno* and stated in one form or another in the cases cited therein, is an ancient one in American law. Its applicability to state court prosecu-

tions has gone virtually unquestioned for many, many years. *Malinski* v *New York, supra; Chambers* v *Florida,* 309 US 227, 60 S Ct 472, 84 L Ed 716 (1940). *Denno* itself arose, of course, out of a state court prosecution. Absent an express ruling by this Court to such effect, it is absurd to argue that the principle that voluntariness is an indispensable requirement for the admission of a confession into evidence is no longer applicable to state prosecutions. If, as respondent contends, the principles or standards laid down in *Miranda* are necessary compliments to the voluntariness requirement, it is equally absurd to argue that those principles or standards no longer apply to state prosecutions, absent an express declaration by this Court to that effect, likewise. The recent decision of the Court in *Brewer* v *Williams,* ..... US ....., 51 L Ed 2d 424, 97 S Ct ..... (1977), by implication at least, runs counter to the contention made by petitioner, albeit, that its basis was more substantially the Sixth Amendment to the Federal Constitution rather than the Fifth Amendment and Sixth Amendment, as was the opinion in *Miranda.*

To be sure, this Court in *Brewer* v *Williams, supra,* pp 435, 437 (L Ed 2d) acknowledged the doctrine of *Miranda* v *Arizona, supra,* virtually as one taken for granted. Citing *Michigan* v *Tucker, supra* (relied heavily upon by the petitioner), the Court made a point of saying that a review of the doctrine was unnecessary.

In conclusion on this point, respondent suggests the obvious question: If the doctrine of *Miranda* no longer applies to state prosecutions, would it not have been far more expeditious and judicially economical for this Court to have summarily denied certiorari in such cases as *Michigan* v *Mosely,* 423 US 96, 46 L Ed 2d 313, 96 S Ct 321 (1975), rather than consider the issue of the validity of the con-

fession therein involved on its merits and find that there was, under the facts, no violation of *Miranda*.

No case decided by this Court since *Miranda* v *Arizona, supra,* has provided any basis for a conclusion that the doctrine pronounced therein has no further applicability to the States. Respondent contends that the doctrine remains so applicable.

II.

THE CONFESSION OF A DETAINED SUSPECT SHOULD NOT BE ADMITTED IN EVIDENCE, WHERE THE SUSPECT, UPON BEING ADVISED OF THE RIGHT TO COUNSEL, ASKS THE INTERROGATING OFFICER, "DO YOU THINK I SHOULD HAVE AN ATTORNEY?", IS TOLD BY THE OFFICER IN REPLY, "I THINK YOU SHOULD TELL ME WHAT HAPPENED", AND THE CONFESSION FOLLOWS.

Respondent recognizes that the argument, as stated cannot be bracketed within the framework of petitioner's Question II. However, respondent rejects the question put by petitioner as not embracing the ultimate issue to be resolved. While it may be praiseworthy and indicative of legal scholarship for the petitioner to argue that *Miranda* v *Arizona, supra,* is not supported by the Fifth Amendment to the Federal Constitution (as the honorable dissenting justices did in that case and in the case of *Michigan* v *Mosely,* 423 US 96, 46 L Ed 2d 313, 96 S Ct 321 (1975), the argument is academic inasmuch as the Court's prevailing opinion remains undisturbed. Petitioner has not said in its brief, except perhaps obliquely, that it should be.

Thus, respondent argues on the basis of the assumption that *Miranda* prevails as the law governing in-custody interrogation and confession, and contends that the confession involved in the instant case falls within its ambit, and is not admissible in evidence.

It is not disputed in this case that immediately after being advised of her right to counsel, the defendant asked the interrogating officer if he thought she should have an attorney. Whether this amounted to a request for counsel in fact, is, to a degree, immaterial. It is clear that it provoked the officer to admonish defendant to "tell me what happened". That could mean no less than, "if you did it, tell me". Such an approach rendered meaningless the inclusion of advice of right to counsel in the "*Miranda*" warning. This Court said (384 US 445):

> "Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. *The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently.* If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking, there can be no questioning." (Emphasis added.)

As stated earlier, respondent argues on the basis of an assumption that *Miranda* continues to hold sway. If that is so, it carries, along with its other attributes, the right to counsel before speaking. Indeed, that may be the most important of the *Miranda* standards, for here the accused's rights under the Fifth and Sixth Amendments are wedded. As for the right to counsel generally, it has long been considered fundamental by this Court, notwithstanding *Betts* v *Brady,* 316 US 455, 86 L Ed 1595, 62 S Ct 1252 (1942).

See *Johnson* v *Zerbst,* 304 US 458, 82 L Ed 158, 53 S Ct 55 (1932).

Gideon v *Wainwright,* 372 US 335, 9 L Ed 2d 799, 83 S Ct 792 (1963), reaffirmed the principle that the right to counsel is a fundamental "right of the accused".

Without a single word or phrase which could be reasonably interpreted as waiving the right to counsel, petitioner insists, nevertheless, that the right was waived. Regardless of the philosophical view which one may take of the *Miranda* doctrine, it is beyond argument that by it this Court undertook to implement the Fifth Amendment protection against self incrimination — like that of right to counsel itself, a fundamental right. As already suggested, such rights cannot be so lightly waived. In *Johnson* v *Zerbst, supra,* at page 464, this Court said:

> "It has been pointed out that 'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and that we 'do not presume acquiescence in the loss of fundamental rights.' A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding the case, including the background, experience, and the conduct of the accused." (Citations omitted.)[1]

This Court's recent opinion in *Brewer* v *Williams, supra,* once again demonstrates that the matter of waiver of fundamental rights is a serious one. The case implicitly rejects the notion that the mere act of giving the statement

[1] Respondent recognizes, of course, that the case cited dealt with waiver of trial counsel.

denotes a waiver of the right to counsel. At 51 L Ed 2d 439, the Court said:

> "The District Court and the Court of Appeals were also correct in their understanding of the proper standard to be applied in determining the question of waiver as a matter of federal constitutional law — that it was incumbent upon the State to prove 'an intentional relinquishment or abandonment of a known right or privilege.' *Johnson* v *Zerbst,* (supra) at 464 82 L Ed 1461, 58 S Ct 1019. . . . That standard has been reiterated in many cases. We have said that the right to counsel does not depend upon a request by the defendant, (citations omitted), and that courts indulge in every reasonable presumption against waiver. (Citations omitted) . . ."

So, in this case one must ask if *Miranda* says that the accused must have been advised of her right to counsel, as she was, where is the indication that she waived that right? There is no dispute between the petitioner and the respondent as to the language used by both the interrogating officer and the accused. The question is, can waiver be shown by that interchange? Respondent respectfully submits that it cannot. The statement of the defendant was not properly obtained and was therefore properly excluded from evidence under *Mapp* v *Ohio, supra.*

CONCLUSION

The criminal defendant's confession was obtained in violation of her rights under the Fifth and Sixth Amendments to the Federal Constitution. The rule of law governing the binding of a defendant over for trial in the State of Michigan requires that the order binding a defendant over for trial must be based upon evidence legally admissible. *Peo-*

ple v *Walker,* 385 Mich 565 (1971); *People* v *Gwinn,* 46 Mich App 134 (1973).

The reviewing state courts were correct in holding that the magistrate properly denied the admission of the confession into evidence. The petitioner's application for writ of certiorari should, therefore, be denied.

Respectfully,

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